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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-304

RICHARD A. GORDON, etc.,
Petitioner,

against

NEW YORK STOCK EXCHANGE, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF RESPONDENTS IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether, in light of this Court's decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) (*"Silver"*), review should be granted to resolve the conflict between the decision of the Seventh Circuit in *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (*"Thill"*)* and the decision below of the Second

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* The *Thill* rationale was applied to registered national securities associations in *Harwell* v. *Growth Programs, Inc.*, 451 F.2d 240 (5th Cir.), *opinion on reh.*, 459 F.2d 461, *cert. denied, sub nom., Nat'l Ass'n of Securities Dealers* v. *Harwell*, 409 U.S. 876 (1972).

Circuit holding that the rules of the New York and American Stock Exchanges fixing minimum rates of commission to be charged by their members on exchange transactions are exempt from the Sherman Antitrust Act (15 U.S.C. § 1 *et seq.*) since such rules are authorized by Section 19(b)(9) of the Securities Exchange Act of 1934 (the "Exchange Act"; 15 U.S.C. § 78a *et seq.*) and are subject to review and revision by the Securities and Exchange Commission (the "SEC").*

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition

This action was commenced on April 2, 1971, by Richard A. Gordon, individually and on behalf of an alleged class of "small investors", against the New York Stock Exchange, Inc. (the "NYSE"), the American Stock Exchange, Inc. (the "Amex") (collectively the "defendant exchanges") and Merrill Lynch, Pierce, Fenner & Smith, Inc. and Bache & Co., Inc., as representatives of an alleged class consisting of the defendant exchanges' members. The complaint (App. 1-10),** while somewhat ambiguously drafted, challenged as an illegal price fixing conspiracy the long established and publicly known practice of the defendant exchanges of adopting and enforcing rules fixing minimum rates of commission for transactions in securities listed on the exchanges. Also attacked were the provisions of the constitutions of the two exchanges fixing the number of their respective members and the alleged

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* The District Court decision affirmed by the Court below is reported at 366 F.Supp. 1261 (S.D.N.Y. 1973). The decision of the Court below is reported at 498 F.2d 1303 (2d Cir. 1974). All references to the decisions below will be by citation to the relevant page of the appendix attached to the petition.

** References to (App. ....) are to the appendix filed in the Court of Appeals. References to (A. ....) are to the appendix attached to the petition.

resulting exclusion of plaintiff from use of the exchanges' trading facilities. Violations of the Robinson-Patman Act (15 U.S.C. § 13(a) *et seq.*) were also pleaded.

The District Court, holding in abeyance petitioner's motion for a class action determination, granted respondents' motion for summary judgment and dismissed the complaint on the grounds that the exchanges' commission rules were exempt from antitrust attack. (App. 355, see 357, 340; A. 26, 27) On appeal petitioner was joined by the Antitrust Division of the Department of Justice as *amicus curiae* in urging the Court of Appeals to reverse the District Court's judgment and remand for trial (A. 36). The SEC, on the other hand, filed a brief *amicus curiae* arguing for affirmance on the grounds asserted by respondents (A. 36).

The Court of Appeals (per Kaufman, C.J.) unanimously affirmed the District Court's ruling on the twin grounds that this Court's opinion in *Silver* compelled an implied repeal of the antitrust laws and that the legislative history of the Exchange Act manifested a Congressional intent to exempt exchanges from the antitrust laws in respect of self-regulatory action undertaken by them within the scope and purposes of the Act and subject to SEC review (A. 39-43).

B. The Relevant Facts

Most of the "Facts" in petitioner's Statement of the Case are irrelevant and exceed the permissible limits set by Rule 23(1) of this Court. There is no real issue as to whether petitioner has been excluded from membership in exchanges to which, as the District Court found, he had never made application (A. 23) or as to his other purported claims under Section 2 of the Sherman Act (15 U.S.C. § 2) and Section 2(a) or (c) of the Robinson-Patman Act (15 U.S.C. § 13(a) *et seq.*) which, as the Court of Appeals found, are "essentially frivolous" (A. 38). The only pertinent question is whether registered national securities exchanges may adopt and enforce rules fixing minimum commission rates free from antitrust liability.

The material facts, which are indisputable, may be briefly stated as follows:

Since their founding, the NYSE and the Amex have at all times had rules (a) limiting the number of individuals who may be members and (b) prescribing the minimum commissions to be charged by members to non-members on exchange transactions (App. 39; 179). The Exchange Act, enacted in 1934, required that all national securities exchanges register with the SEC and become subject to its regulation. The NYSE and Amex applied to the SEC for registration pursuant to Section 6 of the Exchange Act and submitted copies of their respective constitutions and rules, including the rules limiting their respective memberships and prescribing the minimum commission rates then in effect (App. 39-40; 179-80; 195-200). The SEC approved the applications and found the exchanges' constitutions and rules, including those concerning membership limitations and minimum commissions, "just and adequate to insure fair dealing and to protect investors" (App. 39-40; 179-80).

Since 1934 the NYSE and the Amex have amended their commission rules a number of times in conjunction with the SEC. The most recent amendments, challenged here by petitioner, were those which became effective on or about December 5, 1968, April 5, 1970, April 5, 1971, March 24, 1972, April 24, 1972, September 25, 1973, February 24, 1974 and April 1, 1974 (App. 180). In each instance, the amendments were filed with the SEC at the time of adoption as required by Section 6(a)(4) of the Exchange Act. In addition, pursuant to SEC Rule 17a-8, 17 C.F.R. § 240.17a-8, the defendant exchanges filed each proposed amendment with the SEC not less than three weeks prior to the taking of any action on such amendment. (App. 40; 180).

While petitioner urges (pet. pp. 4-6, see 11-13) that the SEC has taken no action with respect to commission rates and has not performed its regulatory functions, the

undisputed facts are quite to the contrary. Thus, the District Court observed that, beginning at least as early as 1963, "the SEC and the Exchanges have undertaken intensive examination of Exchange commission structures and related matters." (A. 32) Likewise, the Court of Appeals, taking judicial notice of the SEC's regulatory activities since 1963 regarding the commission rate structure, concluded that the agency's record demonstrated "extraordinarily active surveillance". (A. 48).

On the basis of the statutory scheme, the legislative history and the SEC's record of active regulation the Court below concluded, under *Silver* and the doctrine of implied repeal, that the rules challenged were exempt from antitrust attack.

REASONS FOR GRANTING CERTIORARI

Petitioner advances (pet. pp. 2-3) four grounds which he asserts warrant a writ of certiorari: (1) the question presented is of great public importance; (2) there is a clear conflict among the Courts of Appeals regarding the proper application of the principles of *pro tanto* antitrust repeal set forth in this Court's *Silver* opinion; (3) grave, but unspecified, Constitutional questions are raised; and (4) the decision below, is, for reasons not stated, in conflict with *Silver*.

Petitioner's vague claim of Constitutional question, raised now for the first time, is completely lacking in merit.* Likewise, his assertion that the decision below conflicts with *Silver* is erroneous. The Court of Appeals for the Second Circuit properly interpreted and applied *Silver* in affirming the dismissal of the complaint.

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* Since no such Constitutional question was raised or argued below, it is not properly before this Court. See, *Simpson* v. *Union Oil Co.*, 411 F.2d 897 (9th Cir.), *rev'd on other grounds*, 396 U.S. 13 (1969); see also, *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16 (1958).

Nonetheless, respondents support the issuance of a writ of certiorari because the question presented by this case is of great public importance and because various decisions in other Circuits, in conflict with the holding below and this Court's *Silver* opinion, subject them to differing, irreconcilable standards of conduct and disrupt the regulatory scheme established by the Exchange Act.

Accordingly, respondents submit this Statement to put the issues fully before this Court so that it may affirm the decision below and thereby resolve the present disarray among the Circuits' views on this antitrust question which is crucial to the operation of national securities exchanges.

ARGUMENT

I

The Scope of an Exchange's Antitrust Exemption for Self-Regulation Subject to SEC Review is a Question of Public Importance as to Which There is a Split in the Circuits

The large values involved in this case, the differing views as to the parameters of this Court's opinion in *Silver* and the conflicting decisions by lower courts cloak with urgency the issue of the extent of exchanges' antitrust exemption.

When this Court was confronted, in *Silver,* for the first and only time, with the need to consider the scope of the antitrust exemption afforded exchange self-regulatory conduct by reason of the Exchange Act, it recognized the importance of the question:

> "We deal here today with the question, of great importance to the public and the financial community, of whether and to what extent the federal antitrust laws apply to securities exchanges regulated by the Securities Exchange Act of 1934." 373 U.S. at 342.

The conduct in question in *Silver*—the withdrawal of private wire connections without a hearing—was neither explicitly contemplated by the Exchange Act nor subject to SEC oversight jurisdiction. As a consequence this Court found no antitrust exemption, but indicated that where challenged self-regulatory conduct was within the scope and purposes of the Act and subject to SEC review a "different case" as to exemption would be presented (373 U.S. at 360).

The issue reserved in *Silver* and presented by this case arose for the first time in *Kaplan* v. *Lehman Bros,* 250 F.Supp. 562 (N.D. Ill. 1966), *aff'd,* 371 F.2d 409 (7th Cir.), *cert. denied,* 389 U.S. 954 (1967), where shareholders in five investment companies (*i.e.,* mutual funds) sued derivatively and on behalf of a class of all other shareholders charging—as petitioner did in this case—that exchange fixing of minimum commission rates was a violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The District Court held the commission rules exempt from the antitrust laws because they are subject to review and revision by the SEC pursuant to Section 19(b)(9) of the Exchange Act. Relying on *Silver,* the Court concluded:

> "This is the 'different case', since the SEC exercises a general and continuing power to change, alter, or supplement the rules of the Exchange fixing the rates of commission. Since review is afforded within the system of securities regulation, there is no need to resort to the antitrust laws for a remedy." 250 F.Supp. at 566.

The Court of Appeals for the Seventh Circuit unanimously affirmed (371 F.2d 409). This Court denied certiorari.

Had the issue been settled by *Kaplan,* despite the failure by this Court to place its imprimatur on the Seventh Circuit's ruling, there would be no split in the Circuits and no pressing reason would exist for this Court to grant certiorari now. But *Kaplan* did not lay the matter to rest.

Three years later, in *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971), the Seventh Circuit was once again called upon to deal with a potential conflict between the antitrust laws and the Exchange Act. Thill Securities Corp. claimed that the NYSE had violated the antitrust laws by prohibiting its members from sharing commissions with non-members (including non-member brokers) or granting to such non-members any rebate or discount from the fixed minimum (the so-called "antirebate rule"). The District Court, relying on *Silver* and *Kaplan,* found the antirebate rule to be an integral part of the NYSE's Congressionally-authorized fixed commission practice, fully subject to SEC review which was being exercised through pending hearings, and therefore granted summary judgment for the NYSE. CCH 1969 Trade Cas. ¶ 72,911 (E.D. Wis., Aug. 26, 1969).

The Court of Appeals for the Seventh Circuit—by a 2 to 1 decision, generating three separate opinions—reversed. That Court read *Kaplan* as merely holding that exchange rules adopted pursuant to the self-regulatory powers granted by the Exchange Act and subject to review and revision by the SEC were not *per se* violations of the antitrust laws (433 F.2d at 268-69). Statutory authorization for commission fixing was not enough, in the Court's view, nor was SEC oversight jurisdiction, even if exercised, sufficient to grant an antitrust exemption. The Court held that an exemption from the antitrust laws for challenged self-regulatory conduct may be found only after a registered national securities exchange and its members demonstrate that the SEC has been actively "exercising its proper supervisory power" over such conduct (433 F.2d 271), and prove to the satisfaction of an antitrust court that the SEC's policy decisions regarding such conduct are both justified and necessary to the achievement of purposes or objectives of the Exchange Act (433 F.2d 273).

In short, under *Thill,* there can be no antitrust exemption—traditionally a pure question of law—without a full

trial on the merits with proof that the conduct permitted by the SEC is justified.

Respondents submit that the reasoning of the *Thill* decision—as gleaned from the three separate opinions rendered—is, in light of *Silver,* insupportable. The *Thill* decision is at odds with both *Silver* and *Kaplan.* The Court below—as well as the District Court it affirmed—in holding the exchanges' commission rules exempt from antitrust attack, reluctantly came to the same conclusion and pointedly expressed disagreement with the *Thill* result and rationale (A. 34, 50). Endorsing the decision in *Kaplan,* the Court below found that the antitrust exemption suggested by *Silver* for exchange self-regulatory conduct required no evidentiary record, required no trial and, most important, did not require an exchange and its members to defend the SEC's exercise of its statutory authority.

In turn, the *Thill* result and rationale were most recently followed in the Seventh Circuit in *Fredrickson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 5 CCH Trade Reg. Rep. 1974-2 Trade Cas. ¶ 75,227 (N. D. Ill., Sept. 9, 1974)—yet another case challenging exchange fixed commissions as a violation of Section 1 of the Sherman Act. There, the District Court found, as did the Court below, that national securities exchanges have traditionally prescribed minimum rates of commission. Likewise, the District Court found—as the Second Circuit did—that Congress, in enacting Section 19(b)(9) of the Exchange Act, had intended to subject such rules to the oversight jurisdiction of the SEC. Finally, the *Fredrickson* Court, like the *Gordon* Court, found that the SEC has in fact exercised its supervisory power over exchange minimum commission rates. Nonetheless, the District Court in *Fredrickson,* expressly disagreeing with the *Gordon* decision, refused to find an exemption from the antitrust laws.

In announcing its conclusion, the *Fredrickson* Court expressed certain reservations about its holding and granted defendants' motion, under 28 U.S.C. § 1292(b), to certify the antitrust exemption issue for interlocutory re-

view. The Seventh Circuit has yet to rule on defendants' petition for leave to appeal.*

It is clear that the question presented by this case, argued to no less than three panels of appellate judges in two Circuits and resulting in the present split of authority, is not only ripe for review by this Court but can only be finally and properly resolved by a further ruling of this Court.

II

The Court Below Correctly Interpreted this Court's Decision in *Silver*

This Court recognized in *Silver* that the Exchange Act established a unique system of self-regulation which placed upon the nation's registered securities exchanges the initial duty to promulgate rules governing their own affairs and committed to the SEC as guardian of the public interest a power of oversight and revision of those rules. Likewise, this Court pointed out that although the Exchange Act contains no express exemption from the antitrust laws and its regulatory scheme is not sufficiently pervasive to create total exemption as to all exchange activities, nevertheless repeal of the antitrust laws is to be regarded as implied where a particular instance of exchange self-regulation falls within the scope and purposes of the Exchange Act and is subject to SEC power of review and revision (373 U.S. at 357, 360-61).

This Court also recognized that to subject self-regulatory activities of the Exchange to antitrust review in areas where the SEC has supervisory jurisdiction could involve problems of "conflict or coextensiveness of coverage with

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* The *Thill* rationale—at loggerheads with the reasoning of the Court below—was applied to an SEC-approved interpretation of a rule of a registered national securities association in *Harwell* v. *Growth Programs, Inc.*, 451 F.2d 240 (5th Cir.), *opinion on reh.*, 459 F.2d 461, *cert. denied, sub nom., Nat'l Ass'n of Securities Dealers* v. *Harwell*, 409 U.S. 876 (1972).

the [SEC's] regulatory power" (373 U.S. at 358). It was the absence of SEC power to review the specific action of the NYSE involved in the *Silver* case (withdrawal of certain non-member private wire connections) which led this Court to conclude that in the special circumstances there presented application of the antitrust laws was not incompatible with the provisions of the Exchange Act. At the same time the Court emphasized that:

> "Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." (373 U.S. at 360).

Dismissal of the complaint in this case by the District Court and affirmance by the Court of Appeals for the Second Circuit reflect the only permissible result under a proper application of both the Exchange Act and *Silver*.

Section 19(b)(9) of the Act provides:

> "The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as . . . (9) *the fixing of reasonable rates of commission, interest, listing, and other charges; . . .*" (Emphasis added).

Although Section 19(b)(9) is framed in terms of a grant of review power to the SEC rather than a direct grant of rule-making authority to exchanges, the provision authorizing

the SEC to "alter or supplement the rules of such exchange" with respect to "the fixing of reasonable rates of commission" obviously contemplates action by the SEC with respect to rates already set by an exchange. This is also apparent from the fact that under Section 19(b)(9) the SEC, as a prerequisite to any revision in existing rates, must first request the Exchange to "effect on *its own behalf*" any suggested "changes in *its* rules and practices." (Emphasis added).

The SEC, which is the agency charged with administration of the Exchange Act, fully supported this interpretation of Section 19(b)(9) in its brief *amicus curiae* urging the Court below to affirm the District Court's judgment.

Because the SEC is vested by Section 19(b)(9) with specific authority to review exchange rates for reasonableness and to exercise a general and continuing power to change, alter or supplement rules of the exchanges fixing rates of commission, the District Court properly held and the Court of Appeals correctly affirmed that this is the "different case" referred to by this Court in *Silver*, requiring a finding of antitrust exemption.

The Court below observed:

> "If the discussion in *Silver* of a core of exchange self-regulation necessary to make the 1934 Act work, and thus immune from application of the antitrust laws, is to be given any meaningful application, we are of the view that it must have reference to the practices enumerated in § 19(b) and in this instance to the fixing of reasonable rates of commission." (A.41)

CONCLUSION

For the foregoing reasons, and notwithstanding the fact that the decision below is in complete accord with this Court's decision in *Silver*, there can be no surcease of litigation on this question of great public importance until this

Court has finally spoken and resolved the conflict between the Second and Seventh Circuits. Therefore, a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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